NO. 20176

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEROY WATKINS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION

MANUEL L. REAL
United States Attorney
JOHN K. VAN DE KAMP
Assistant United States Attorney
Chief, Criminal Division
J. BRIN SCHULMAN
Assistant United States Attorney
Assistant Chief, Criminal Division
RONALD S. MORROW
Assistant United States Attorney

600 U.S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee
United States of America

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I

STATEMENT OF JURISDICTION

Appellant was indicted by the Federal Grand Jury for the outhern District of California, Northern Division, for violation of itle 18, United States Code, Section 2421, the White Slave Traffic ct. [C. T. 19]. 1/ Following a jury trial on June 26, 1962, in he District Court for the Southern District of California, Northern ivision, he was convicted and sentenced on June 29, 1962, to two our year terms of imprisonment, the two terms to run consecu-ively [C. T. 24]. No appeal was taken from the above conviction. ppellant filed the subject 2255 motion on February 17, 1965 [C. T.].

/ C. T. refers to Clerk's Transcript.

On February 19, 1965, there was filed and entered by the District Court an order denying what the court referred to as appellant's motion for a Writ of Habeas Corpus ad Testificandum [C. T. 13]. On March 2, 1965, there was filed and entered, by the District Court, an Order Correcting Order dated February 19, 1965, Nunc Pro Tunc [C. T. 16], which Order corrected the title of the February 19, 1965 Order and further, denied the motion made which had been made pursuant to Title 28, United States Code, Section 2255.

The appellant filed, on March 11, 1965, a Notice of Appeal from the Order of March 2, 1965 [C. T. 17].

The District Court had jurisdiction under the provisions of Title 18, United States Code, Sections 2421 and 3231, and Title 28, United States Code, Section 2255.

This Court has jurisdiction to review the judgment of the District Court pursuant to Title 28, United States Code, Sections 1291, 1294 and 2255.

II

STATUTE INVOLVED

Appellant's motion, the denial of which is the basis of the instant appeal, was brought under the provisions of Title 28, United States Code, Section 2255, which, in pertinent part, provides:

"A prisoner in custody under sentence of a

court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . ., or is otherwise subject to collateral attack, may move the Court which imposed the sentence to vacate, set aside or correct the sentence. . . .

"An appeal may be taken to the Court of Appeals from the order entered on the motion as from a final judgment or application for a Writ of Habeas Corpus. . . . "

III

STATEMENT OF THE CASE

A. Questions Presented

1. Whether appellant is entitled to relief in this Court of Appeals upon a ground not urged in the District Court, to wit, whether the prosecution made improper remarks to the jury.

2. Whether there was sufficient evidence to support the conviction on Count One of the Indictment.

3. Whether appellant was denied his right to an appeal from his conviction.

B. Statement of Facts

On December 25, 1961, appellant, in the company of Ruby Nixon, and Gay Hines, made a trip to Phoenix, Arizona, from

resno, California [R. T. 66-67]. [2/] The trio made the trip in an utomobile owned by Emil Kabob, who had placed his car in Ruby ixon's car e [R. T. 77]. Appellant paid for the gasoline used on ie trip [R. T. 67], and shared in the driving [R. T. 68].

Prior to making the trip to Phoenix, Nixon overheard a onversation between appellant and Hines revealing that Hines new the location of labor camps to be worked by prostitutes in rizona [R. T. 82-83].

Upon arriving in Phoenix, Arizona, the group picked up renda Joyce Wilson Rogers and proceeded to a labor camp in the hoenix area [R. T. 37, 68]. By charging $5 and $3 per engage- ient, Rogers and Nixon managed to accumulate $300 in "three or our hours" of prostitution [R. T. 68-69, 74-75]. The money arned was handed to the appellant [R. T. 69].

Prior to the trip to Arizona, Nixon had worked as a rostitute for appellant [R. T. 59-60], turning over to him all ionies which she earned [R. T. 60, 63].

The following day, December 26, 1964, appellant, in the fore mentioned automobile, returned to Fresno, California, from hoenix, Arizona, in the company of Hines, Rogers and Nixon R. T. 70-71, 36-37]. Again, appellant provided for the expenses f the trip [R. T. 71].

Rogers, like Nixon, had worked as a prostitute for ppellant prior to December of 1961 [R. T. 30], and had also

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/ R. T. refers to the Reporter's Transcript of [Trial] Proceedings.

relinquished to him all of her earnings [R. T. 30].

Before leaving Phoenix, there was an understanding that Nixon and Rogers were going to work as prostitutes for appellant n California [R. T. 37]; and, in fact, Nixon and Rogers did engage n prostitution after returning to California, giving the money earned, as before, to appellant [R. T. 37].

IV

SUMMARY OF THE ARGUMENT

Appellant, in his opening brief, has concerned himself with three points.

His first argument states that he was denied his right to a direct appeal from his conviction by the non-feasance of his attorney and the Clerk of the District Court. Relying on Dodd v. United States, 321 F. 2d 240 (9 Cir. 1963), appellant now desires o raise two substantive points, one of which was never presented o the Distr ict Court in appellant's subject "2255" motion. nasmuch as Dodd, id., applies only when there has been prejudice to the defendant, we will concern ourselves with appellant's wo substantive arguments prior to reaching the Dodd argument. The two substantive points of appellant did not result in any prejudice and, therefore, his first is moot.

Appellant's second argument is concerned with an alleged nsufficiency of the evidence. Appellant contends that the "purposes" of the trip as referred to in Count One of the Indictment were not

roven. Judge Crocker's order, the denial of which is the sub-
ct of the instant appeal, amply demonstrates that the defendant's
ip from Fresno, California, to Phoenix, Arizona, was for the
legal purposes charged in the Indictment.

Appellant's third argument relative to closing argument
Government counsel, was not even presented to the District
ourt in appellant's 2255 motion or otherwise, and, therefore,
ay not be considered on this appeal. We note that in his 2255
otion, appellant raised a point pertaining to the Escobedo
octrine, which point he has abandoned on this appeal.

V

ARGUMENT

A. APPELLANT'S CONTENTION OF ERROR RESPECTING GOVERNMENT COUNSEL'S ARGUMENT TO THE JURY, AT TRIAL, IS NOT PROPERLY BEFORE THIS COURT

Appellant's argument, beginning at page 6 of his opening
rief, is not ripe for review by this Court. The ground presented
or consideration in the opening brief was not presented to the
istrict Court in the 2255 motion; nor for that matter was such
n issue preserved for consideration even if there had been a
irect appeal, there not having been a timely trial objection. The
ppellant's motion to vacate sentence was concerned only with
ufficiency of the evidence and whether he had been advised by the
BI agent, prior to an admission, of his constitutional rights.

The Reporter's Transcript, at pp. 99-100, as noted by Judge Crocker in his order denying the 2255 motion, shows clearly that appellant was so advised of his rights.

Since appellant's allegation of an illegal commenting on the evidence was not raised below, it may not be passed upon by this Court. A point cannot be raised for the first time on an appeal from a denial of a motion pursuant to Title 28, United States Code, Section 2255.

Standley v. United States, 318 F. 2d 700 (9 Cir. 1963), cert. den. 376 U. S. 917 (1964), reh. den. 376 U. S. 967 (1964);

Smith v. United States, 287 F. 2d 270 (9 Cir. 1961), cert. den. 366 U. S. 946 (1961).

Appellant can be afforded no relief on this appeal relative to a belated attack on a comment upon the evidence.

B. THERE WAS SUFFICIENT EVIDENCE OF PROHIBITED "PURPOSES" TO SUSTAIN THE CONVICTION OF COUNT ONE OF THE INDICTMENT.

The purpose of appellant's trip to Arizona in December of 1961 is clearly demonstrated by the evidence.

Prior to leaving for Arizona, appellant had a discussion with Gay Hines, in Fresno, California, concerning labor camps that could be "worked" by prostitutes in Arizona [R. T. 82-83]. Upon appellant's arrival in Arizona, he proceeded forthwith to

uch a labor camp and the women with him, one of whom he had rought from Fresno, engaged in acts of prostitution, giving to ppellant all of the money they earned, as they had done in the ast [R. T. 37, 68]. Both before and after the trip to Arizona, oth girls worked as prostitutes for appellant, he receiving from iem all of their earnings [R. T. 30, 37, 60, 63]. The pattern as consistent, only the location of their prostitution activities hanged.

The jury was certainly entitled to infer, from the above vidence, that the dominant purpose of the subject trip was for ie purpose of prostitution.

C. APPELLANT'S CONTENTION THAT HE WAS DENIED THE RIGHT TO APPEAL FROM HIS CONVICTION IS MOOT SINCE HE DID NOT SUFFER "ANY PREJUDICE" AND WAS NOT THE VICTIM OF "PLAIN REVERSIBLE ERROR IN THE TRIAL."

The District Court's order denying the subject motion roperly decided the matter. Dodd v. United States, 321 F. 2d 40 (9 Cir. 1963), is perplexing to the reader for several easons. First, "plain reversible error" is mentioned as the tandard that must be shown before a court will give relief nder Section 2255 in a situation where no direct appeal has een taken on issues not otherwise properly within a 2255 motion. econd, "any prejudice" is mentioned as the standard. In the nstant case as shown in our previous argument neither plain

reversible error, nor any prejudice has been shown.

If this Court were to find that either "plain reversible error" or "any prejudice" has been shown on any of the substantive issues contained in appellant's 2255 motion, then the matter should be remanded to the District Court for findings as to whether there was or was not an "intentional relinquishment of petitioner's right of appeal." Dodd, supra, at 246. In order to erase any ambiguity, the appellee maintains that "any prejudice" should not be the standard employed. Cf., Thomas v. United States, 343 F. 2d 49 (9 Cir. 1965).

It is submitted that remand is not necessary because there has been no showing of substantive error of any kind.

CONCLUSION

There being no error in the denial of appellant's motion, the judgment should be affirmed.

Respectfully submitted,

MANUEL L. REAL,
United States Attorney
JOHN K. VAN DE KAMP
Assistant United States Attorney
Chief, Criminal Division
J. BRIN SCHULMAN
Assistant United States Attorney
Assistant Chief, Criminal Division
RONALD S. MORROW
Assistant United States Attorney

Attorneys for Appellee
United States of America

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion the foregoing brief is in full compliance with those rules.

/s/ Ronald S. Morrow
RONALD S. MORROW
Assistant United States Attorney